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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

NORMA A. GILHAM,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari
To The Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

In direct conflict with a prior decision of the Montana Supreme Court, the court of appeals held that there was probable cause to stop and search an automobile based solely on the tip of a previously reliable informant.

The questions presented are:

1. Whether the seizure of Indian defendants in Indian Country in a traffic stop by a state officer acting outside his jurisdiction is a violation of the Fourth Amendment?

2. Whether evidence obtained from such an illegal stop can be admitted under the "Independent Source" exception to the fruit of the Poisonous Tree Doctrine when the "Independent Source" is the tipster whose information supplied the sole justification for the initial stop?

3. Whether a previously reliable informant's tip, that a certain automobile driven at a certain time and place contains drugs when the factual basis for the tip is unknown, and with no corroboration of any details indicating that an offense is being committed by the occupants of the automobile, can supply an articulable suspicion for an investigative stop?

PARTIES TO THE PROCEEDING

NORMA A. GILHAM and COLLEEN BARCUS,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

Co-Petitioner Barcus is filing a Petition for Certiorari under separate cover.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported, and is reprinted in the Appendix at 1. The opinion of the District Court, *United States of America v. Norma Gilham and Colleen Barcus*, No. 93-016, (D. Mont. 10/1/93) is unreported and is reprinted in the Appendix at 11.

JURISDICTION

The decision of the Court of appeals was entered on March 15, 1995. A petition for rehearing with suggestion for Rehearing En Banc was filed pursuant to Rules 35 and 40, Fed. R. App. P. That petition was treated as timely; although rehearing was denied on May 19, 1995, the court did issue an amended memorandum on that date, which is reprinted at Appendix 1. This Petition for Certiorari was filed within 90 days of the date of denial of the petition for rehearing. Accordingly this petition is filed within the time allowed by law. The jurisdiction of this court is involved under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision of the United States Constitution involved in this case is the Fourth Amendment to the United States Constitution. The Fourth Amendment is set forth in full in the Appendix at 16.

The statutory provision at issue is 25 U.S.C. 1326, § 406 of Title 4 of the Indian Civil Rights Act, which provides that tribal consent to jurisdiction may be manifested only by a majority vote of the tribes' enrolled adult Indians, voting in a special election held for that purpose. The text of 25 U.S.C. § 1326 is set forth in full at Appendix 16.

STATEMENT OF THE CASE

This case began with the receipt of an uncorroborated informant's tip that Norma Gilham was en route to Browning, Montana, on the Blackfeet Indian Reservation with a large quantity of drugs in a vehicle with Montana license plates "38 SPCL." Based on that tip, law enforcement officers set up surveillance for her automobile and obtained a search warrant from the Glacier County, Montana Justice of the Peace to search her car. On April 18, 1993 Highway Patrolman Tony Cox spotted her car [Tr. p. 154, *ll.* 23] and stopped it approximately one-half mile inside the Blackfeet Reservation. He stopped the car for the purpose of serving the warrant and waited for Deputy Sheriff Wayne Dusterhoff to arrive and serve the warrant. Dusterhoff arrived and began to read the warrant to the Defendants but before finishing, Defendant Colleen Barcus "just took off" [Tr. p. 165, *ll.* 23-25] jumped in Gilham's car and fled with the various officers in pursuit. During this time Gilham remained in the custody of the officers. Barcus was ultimately apprehended, and officers observed her dumping something into the lake near where her car came to rest.

Later, the car was searched pursuant to a Federal warrant and cocaine was discovered in the car, as well as drug using paraphernalia. The total amount of cocaine seized was approximately 4.5 grams. The defendants were sentenced on the basis of 500 grams, Appendix 9.

Gilham and Barcus were indicted on charges of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute in violation of 21 U.S.C. § 846 and 841(a)(1). The Defendants moved to suppress all evidence seized, alleging a pretextual stop based on the invalid J.P. Court Warrant, and the officer's lack of jurisdiction. The District Court denied two motions to suppress, first noting that the stop was admittedly pretextual, App. 12, stating:

> "Patrolman Cox concedes he detained Gilham and Barcus and deliberately stalled until Deputy Sheriff Dusterhoff could arrive with the warrant."

Nonetheless, Judge Hatfield held that there was an intervening cause supplied *by the flight of Barcus* as applied to both defendants:

> "In the case *sub judice,* assuming the initial detention of the defendants was illegal, the court concludes the intervening flight of defendant Barcus and the subsequent chase, together with the other untainted evidence known to the law enforcement officers, clearly supplied probable cause to arrest defendant Barcus and search the subject vehicle. Furthermore, it is undisputed that the law enforcement agents observed the challenged evidence in plain view in defendants' vehicle at the time Barcus was apprehended, thereby falling within the "plain view"

> exception to the warrant requirement. Under the facts presented, the court concludes the Government learned of the challenged evidence from an independent source sufficiently removed from the initial detention so as to purge the taint of any constitutional improprieties inherent in the detention an initial warrant issued by the Glacier County Justice Court."

The Defendants were convicted at a joint jury trial on both counts. Gilham was sentenced to a concurrent term of 63 months on each count, Barcus to 78 months. Both appealed the convictions and sentences to the Ninth Circuit.

Both Defendants moved for bail pending appeal, alleging that they could show exceptional circumstances, see 18 U.S.C. § 3145(c), to the mandatory detention act, 18 U.S.C. § 3143(b)(2), and that the case raised a substantial question of law likely to result in reversal, 18 U.S.C. § 3143(b)(1)(B). A panel of the Ninth Circuit agreed and released the Defendants in an order dated February 2, 1995.

A different panel of the Ninth Circuit was then assigned to hear the case, and oral argument set. That panel published an order stating:

> "The parties are instructed to be prepared to discuss at oral argument on Friday, February 10, 1995, the issue of Patrolman Cox's "cross-deputation", and whether he has jurisdiction to make stops in order to enforce state, federal, or tribal Laws on the Blackfeet Reservation."

The panel affirmed the District Court, initially refusing to consider the jurisdictional issue stating it had not

been raised below. Both Defendants then petitioned for rehearing and Rehearing En Banc. Although the panel denied the request for rehearing, it reissued an amended decision on May 19, 1995, which once again upheld the District Court but on a different basis; while conceding that the stop "may have been improper because Patrolman Cox lacked jurisdiction to make the stop on the Blackfeet reservation," the court refused to reach that question, holding that even if the initial stop was improper, the challenged evidence was admissible because it fit the "independent source" exception to the fruit of the poisonous tree doctrine where the "independent source" consisted solely of the informant's tip.

The defendants are petitioning this court for a review of the decision of the Court of Appeals. Defendants unsuccessfully sought bail pending certiorari from the District Court and are now in federal custody; they are seeking review of the Detention Order in a separate proceeding.

ARGUMENT

I. THE DECISION OF THE NINTH CIRCUIT ON THE INITIAL STOP DIRECTLY AND IRRECONCILABLY CONFLICTS WITH A DECISION OF THE MONTANA SUPREME COURT

The Montana Supreme Court has held in *State v. Anderson*, 853 P.2d 1245 (Mont. 1993) that a tip corroborated by only innocent details, supplied by a previously reliable informant, is insufficient to supply the particularized suspicion required by this Court in *United States*

v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 694-95, 66 L.Ed. 2d 621, 628 (1981) for investigatory stops of automobiles.

The facts of these two cases could not be closer. In *Anderson*, a *previously accurate confidential informant*, 853 P.2d 1249 (*Weber*, J., dissent) (emphasis by the Court) tipped the police that Duane Anderson's blue pickup carrying a large quantity of marijuana would be traveling from Washington to Montana late at night on a specific date. The officers set up a surveillance plan, and spotted the blue truck in the early morning hours of October 9, 1991. After verifying that the license plate was Anderson's, police stopped the truck, frisked the occupants, and seized 11 pounds of Marijuana. *Id.*, at 1250.

The court in *Anderson* noted that in 1991, the Montana legislature amended the investigative stop statute, § 46-5-401 M.C.A., to provide that an officer may stop "in circumstances that create a *particularized suspicion* that a person or occupant of the vehicle has committed, is committing, or is about to commit an offense" (emphasis added). The purpose of this amendment was "[t]o be consistent with United States Supreme Court and Montana case law," *State v. Reynolds*, 52 St. Rep. 600, 601 (Mt. S.Ct. July 17, 1995). The *Anderson* court went on to note that this standard requires objective data to infer that the occupant of the vehicle is engaged in wrongdoing.

In the instant case, the court was presented with an almost identical set of facts. According to the search warrant, the officers corroborated the existence of the "38 SPCL" automobile, the fact that it was traveling from

Washington to Montana, and claimed to have corroborated that Norma Gilham was staying at a certain motel. The Court however, then incredulously ruled as follows:

> "The initial stop was supported by probable cause. The C.I. who had provided the initial tip had proven to be reliable several times in the past. As this Circuit has noted: if the informant has provided accurate information on past occasions, he may be presumed trustworthy on subsequent occasions. (*citation omitted.*) Appendix 4.

Parenthetically, the Petitioner would note that there was no corroboration of any of the *illegal* activity alleged by the tipster. The only corroboration was of the car make, and license plate number, and the fact that Norma Gilham checked into a motel in Tacoma, none of which are illegal activities. Officer Cox admitted that the car was doing nothing unusual and committed no traffic offense. He stopped it to serve a Justice Court warrant that the County Attorney had told him was invalid.

The Court then ruled that even if the initial stop was improper, the challenged evidence was inadmissible as an independent source exception to the "fruit of the poisonous tree doctrine." *Id.*, at 5. The Court ruled that the "independent source" exception would apply if, after excising improper information from the affidavit submitted in support of the Federal warrant, the remaining untainted evidence still provided probable cause sufficient to issue the warrant. Appendix 6. There are two things wrong with this holding. First, not all the evidence was seized pursuant to the Federal warrant. Plastic bags, which contained the cocaine residue, were critical at sentencing; in fact, the testimony of the F.B.I. agent that the

bags would have held 500 grams of cocaine, was a fundamental part of the sentence, see Appendix 8, since only 4.5 grams were actually recovered fro the automobile search. These bags were seized by officer Mike Parker immediately after the flight of Barcus at Hurley Lake.

Second, the only evidence which did not flow from the illegal stop was that which failed to amount to probable cause, i.e., the uncorroborated tip.

> "As described above, there was sufficient information to provide probable cause to search Gilham's vehicle before the initial stop took place. The affidavit submitted in support of the Federal warrant included not only evidence resulting from the objectionable stop, but also all of the pre-stop information that had served as the basis for the initial warrant. The Federal warrant thus was supported by probable cause wholly apart from any information obtained as a result of the initial stop. Because the excised version of the affidavit was sufficient to establish probable cause for the warrant, we hold that the independent source exception applies in the instant case, the evidence is therefore admissible." (slip op. at pg. 6) Appendix 6.

Thus, the "independent source" is in fact the tipster.

Recognizing that "an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity" this Court set forth a two part test to evaluate whether the police have sufficient cause to stop a person. *Cortez, supra,* 449 U.S. at 417-18. The essence of that test is that the totality of the circumstances must give the police a

particularized suspicion *and objective basis* for suspecting the person of criminal activity. *Cortez*, 449 U.S. at 417-18.

The Ninth Circuit decision also conflicts with the decision of this Court in *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L.Ed.2d 612 (1972). In that case, the police officer was acting on a tip supplied moments earlier by an informant, and this Court held that it had sufficient indicia of reliability coupled with the officer's own observations that it justified the stop. By contrast, officer Cox in this case relied on an informant's tip which included *no factual basis* to indicate its reliability. See, *Anderson, supra*, at 853 P.2d 1248. As professor LaFave, a noted authority, has commented, "[i]t makes no sense to require some indicia of reliability that the informer is personally reliable but nothing at all concerning the source of his information, considering that one possible source would be another source who is totally unreliable." 2 Wayne LaFave, A Treatise on the Fourth Amendment, § 9.3(e) note 317.

Here, there is no objective data upon which Officer Cox could form a resulting suspicion that Norma Gilham and Colleen Barcus were involved in a crime. The panel citation to *U.S. v. Angulo-Lopez*, 791 F.2d 1394 (9th Cir. 1986) is inapposite to the issue of particularized suspicion to stop the Gilham vehicle. *Angulo-Lopez* was a search warrant case, where the information supplied by the informant was independently verified by police surveillance of suspicious activity. The panel statement that "the information [that the car was carrying drugs] had been independently verified by Glacier County Deputy Sheriff Wayne Dusterhoff" is just plain wrong. The only reference to verification in the transcript by Deputy

Dusterhoff is his verification of Norma Gilham's location (Transcript p. 25, Suppression Hearing). Did the informant personally observe a drug deal go down in Tacoma? Did he hear it from someone else, who in turn heard it on the street? The basis or source for the informant's knowledge is absolutely unknown.

Here, all the police had was a conclusory statement from a previously-reliable informant that the car was carrying drugs, exactly the same fact pattern in *Anderson, supra*. See *Weber*, J., dissent at 853 P.2d 1250. The majority in *Anderson* held that there was no reasonable suspicion to stop because the informant's tip included "no factual basis to indicate its reliability." *Id.* at 1246; the same infirmity exists with the tip in the instant case. The holding of the Montana Supreme Court and the Ninth Circuit are irreconcilable on the identical issue.

There are several permutations of the previously-reliable Informant's tip which does not contain a factual basis. First, police may corroborate guilty or suspicious details by their own observations (or may observe an outright traffic violation). Thus, under *Cortez*, there is an objective basis for the stop.

The second permutation is the tip which contains a factual basis, coupled with police corroboration of details innocent in themselves but which predict future behavior and confirm the illegal activity. *Alabama v. White*, 446 U.S. 325, 110 S.Ct. 2412, 110 L.Ed. 2d 301 (1990) (anonymous tip).

The third permutation which has never been squarely addressed by this court is the tip which contains no factual basis, and the only police corroboration is of

innocent details which neither confirm nor deny any illegal activity. In this situation, the lower courts are in disarray. See *LaFave, supra,* § 9.3(e) at n. 316.

Federal Courts may not allow admission of evidence that would have been inadmissible in state court due to a violation of the Fourth Amendment by State Officers. *Elkins v. United States,* 364 U.S. 206, 809 S.Ct. 1437, 4 L.Ed.2d 1669 (1960). Here the officer made an investigative stop that would not have passed muster in State Court, because it would not have satisfied Montana's investigative stop statute, which codifies the decisions of this Court. The evidence should not have been admitted.

II. THIS COURT SHOULD DECIDE WHETHER A STATE OFFICER WITH NO AUTHORITY ON A RESERVATION VIOLATES THE 4TH AMENDMENT BY MAKING A TRAFFIC STOP

A. Officer Cox Had No Jurisdiction To Stop The Car As He Was Acting Beyond His Authority; His "Cross-Deputation" Is Invalid As A Matter Of Tribal Law And Violates § 406 Of The Indian Civil Rights Act

On February 2, 1995, the Ninth Circuit panel issued the following order:

> The parties are instructed to be prepared to discuss at oral argument on Friday, February 10, 1995, the issue of Patrolman Cox's "cross-deputation", and whether he has jurisdiction to make stops in order to enforce state, federal, or tribal Laws on the Blackfeet Reservation.

In 1953, pursuant to its plenary authority over Indian affairs, Congress enacted Public Law 83-280, codified at 18 U.S.C. 1162 and 28 U.S.C. 1350, the first federal jurisdictional statute of general applicability to Indian reservation lands and "[t]he primary expression of federal policy governing the assumption by states of civil and criminal jurisdiction over the Indian Nations." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 884, 106 S. Ct. 2305, 90 L.Ed 2d 881 (1986) (Three Tribes II).

Next, in 1968, Congress enacted Title 4 of the Indian Civil Rights Act, which repealed § 7 of Public Law 83-280. Title 4 requires that all subsequent assertions of jurisdiction be preceded by tribal consent. That Act amended Public Law 83-280 so that "any state not presently having civil and criminal jurisdiction over Indian tribes would be required to obtain the consent of the tribes before assuming such jurisdiction." (Views of Senator S. Ervin, 90th Congress' second session quoted in *Connecticut v. Spears*, 21 I.R.L. 5133, 5135). In order to verify that tribal members were in fact "[r]eady to accept such jurisdiction," Congress enacted § 406 of Title 4, 25 U.S.C. 1326. Section 406 provides that tribal consent may be manifested only by a majority vote of the tribes' enrolled adult Indians, voting in a special election held for that purpose. *Kinnerly v. District Court of Montana*, 400 U.S. 423, 429, 91 S. Ct. 480, 27 L.Ed 2d 507 (1971). As noted in *Spears, supra*, there is only one method by which consent can be demonstrated, and only one tribal consent required, and that is set forth in § 406 of the Act.

This Court in *Kinnerly* also explicitly analyzed the procedures by which "tribal consent must be manifested"

under Title 4 of the Indian Civil Rights Act and held that unilateral legislative action by a tribal council "does not comport with the explicit requirement of the Act."

Given this statutory authority and case law and applying it to the Blackfeet Tribal Ordinances and the situation at hand, it is apparent that the Blackfeet Tribe has not validly consented to the jurisdiction of the State of Montana nor has Deputy Cox been properly authorized to enforce any laws on the Blackfeet Reservation. The apparent authority for "cross-deputation" is contained in Tribal Ordinance 7-59, dated August 6, 1959, which in § 1 adopts the Traffic Code of the State of Montana and provides in ¶3 that "the Blackfeet Tribal Council, in the interest of promoting traffic safety, *may* issue deputy commissions as tribal police officers to members of the Montana Highway Patrol, and any officers holding such deputy commission shall have the same powers to apprehend and arrest persons subject to the jurisdiction of the Blackfeet Tribe as the tribal police" (emphasis supplied.) This provision was enacted prior to § 406 of the I.C.R.A.

Later, the Tribe enacted Ordinance 44 which specifically rejects the jurisdiction of the State of Montana.

It is clear from the above case law that Ordinance 7-59 runs afoul of the Indian Civil Rights Act and confers no authority whatsoever on the State of Montana. Therefore, the cross-deputation of Deputy Tony Cox is invalid to confer jurisdiction on him to enforce any laws, traffic or otherwise, since the Ordinance has not been subjected to a vote of the tribes' enrolled adult Indians. *Kinnerly, supra.*

In a supplemental letter to the Ninth Circuit, the Government cited § 18-11-101 M.C.A. *et seq.*, which authorizes state-tribal cooperative agreements. However, § 18-11-104 of that statute, Detailed Contents of Agreement, states in § 2 that if an agreement involves law enforcement, it must also include training standards and qualifications, the apportionment of liability, insurance coverage and a chain of command. None of these are present in the Blackfeet Tribal Ordinance. Furthermore, such agreements must be approved by the Attorney General, § 18-11-105 M.C.A. (1993), and must be filed with the Bureau of Indian Affairs, the County Clerk and Recorder, and the Secretary of State of the Tribal Government. § 18-11-107 M.C.A. (1993). None of these things have been done. Finally, in the Section entitled Specific Limitations on Agreements, no agreement is allowed that is not permitted by federal law and "no such agreement may be considered to affect the underlying jurisdictional authority of any party unless expressly authorized by Congress." Section 18-11-110(1) M.C.A. (1993).

Title 25 of the United States Code also contains a Section on Cooperative Agreements. Under § 25 U.S.C. § 2804, Assistance by Other Agencies, Subsection A, Agreements for Use of Personnel or Facilities of Federal, Tribal, State, or Other Government Agency, authorizes *the secretary* to enter into an agreement to use the personnel or facilities of other governments to aid in the enforcement of laws in Indian country.

The record is bare of any agreement between the Secretary (of the Interior) with the State of Montana. Although it is *possible* for a highway patrolman to enforce

traffic laws on the reservation, none of the proper procedures have been followed, and Ordinance 7-59 (which is specifically limited to Traffic Laws) has apparently been repealed by Ordinance 44's language that applies not only to *concurrent* jurisdiction (over the Tribal Code) but *any* jurisdiction to the State of Montana.

B. Other Circuit Courts And State Courts Of Last Resort Have Held That State Officers Who Arrest Tribal Members Without Proper Authorization Violate The Fourth Amendment.

Lower courts which have considered the issue, of whether an officer outside his jurisdiction violates the 4th Amendment by making an arrest or serving a warrant, have uniformly decided that it rendered the evidence seized thereby inadmissible. In *U.S. v. Baker,* 894 F.2d 144 (10th Cir. 1990), the Tenth Circuit held that a state court had no jurisdiction to issue a search warrant for evidence of suspected criminal activity on property rented by an enrolled tribe member within the exterior boundaries of tribal land. See also *U.S. v. Burnett,* 77 F.2d 593, 596 (10th Cir. 1995), *State v. Burnett,* 671 P.2d 1165, 1166-68 (Okla. Crim. App. 1983), *Langley v. Ryder,* 778 F.2d 1092, 1095-96 (5th Cir. 1995), *Bartlett v. Solem,* 691 F.2d 420, 421 (8th Cir. 1982) (en banc) affirmed, 465 U.S. 463, 467 n. 8, 104 S. Ct. 1161, 1164 n. 8, 79 L.Ed.2d 443 (1984).

Similar reasoning has been applied by other courts for warrantless searches and arrests as well. See, e.g., *U.S. v. Anderson,* 857 F. Supp. 53 (D.S.D. 1994) (state parole agents lacked criminal jurisdiction to conduct warrantless search of native American parolee's residence on the

reservation), *In re DeNetClaw*, 83 Az. 299, 320 P.2d 697-700-01 (1958) (court discharged Indian defendant because the state lacked jurisdiction to make a traffic stop). *Accord, C.M.G. v. State*, 594 P.2d 798, 804 (Okla. Crim. App. 1979).

A warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause. *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990). Absent exigent circumstances, such an arrest is presumptively unreasonable. *Id*, citing *Michigan v. Summers*, 452 U.S. 692, 700, 101 S. Ct. 2587, 2593, 69 L.Ed.2d 340 (1981).

In *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498 (S.D. Cal. 1992) State defendants argued that even if they could not criminally prosecute four individuals for gaming violations, they retained the authority to search for and seize illegal gaming devices. *Id.* at 1505. The court disagreed, saying that "a state is without authority to engage in preliminary law enforcement activities if the state is without jurisdiction to prosecute a violation," citing *Clinton*, Criminal Jurisdiction over Indian lands, 18 Ariz. Law Rev. 508, 572-74 (1976) and *U.S. v. Baker, supra*, and *Ross v. Neff, supra.*

The panel decision assumes that there was a problem with officer Cox's jurisdiction but refused to decide the issue. (Slip Op. at p. 6) This Court has never considered, but should address, the admissibility of evidence seized by an officer acting outside the scope of his jurisdiction on an Indian Reservation in violation of § 406 of the

Indian Civil Rights Act. This case raises substantial questions involved in the everyday law enforcement responsibility, authority and judgment for all law officers who operate on the boundaries of Indian Country; those questions should be addressed by this court.

C. The Independent Source Exception To The Exclusionary Rule Does Not Apply In This Case; The Decision Of The Ninth Circuit Conflicts With The Rationale Behind The Independent Source Doctrine As Set Forth By This Court

The exclusionary rule bars the admission of evidence obtained in violation of the Constitution, extending beyond the direct products of government misconduct to evidence derived from the illegal conduct, or "fruit of the poisonous tree." *Nardone v. U.S.*, 308 U.S. 338, 341 60 S. Ct. 266, 268, 84 L.Ed. 307 (1939). As the Ninth Circuit noted in *U.S. v. Ramirez-Sandoval*, 872 F.2d 1392, 1396 (9th Cir. 1989) this Court has developed three exceptions to the "fruit of the poisonous tree" doctrine which allowed the admission evidence derived from official misconduct. These three exceptions are the "independent source exception, the attenuated basis exception, and the 'inevitable discovery' exception." *Id.*

The "independent source" exception operates to admit evidence that is actually found by legal means through sources unrelated to the illegal search. *Id.*, citing *Silverthorn Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L.Ed. 319 (1920). As the Ninth Circuit pointed out in *Ramirez-Sandoval*, independent source evidence is not "fruit of the poisonous tree"

because its discovery through independent legal means *does not result from the officers' illegal conduct.* Here, the discovery of any evidence results from a traffic stop by an officer without jurisdiction, for a constitutionally infirm reason.

> Although the three exceptions to the fruits doctrine develop separately, they are closely linked to one another. As the Fifth Circuit recently noted, the three exceptions converge to a certain extent, as in each case "the core inquiry is whether the police would have discovered the evidence if the misconduct had not occurred." (Citations omitted.)

U.S. v. Ramirez-Sandoval, at 872 F.2d 1396.

The evidence should not have been admitted on any basis; but for the misconduct – i.e., an illegal stop by an officer with no authority, who lacked adequate justification for an automobile stop anywhere in Montana, no evidence at all would have been discovered.

The thrust of Judge Hatfield's decision is that Colleen Barcus's flight was an intervening circumstance after the illegal stop which made the seizure of cocaine in the car "attenuated" or remote. Appendix 13-14. The Ninth Circuit decision rests on the premise that the officer had "probable cause" based solely on the unverified tip *before* the stop. Appendix 6.

The critical determination to be made by this Court is whether authorities have obtained the evidence by means that are sufficiently independent and remote ("attenuated") to dissipate the taint of their illegal conduct. That determination may be made by the following three part

test: (1) The temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct. *Brown v. Illinois,* 422 U.S. at 603-604, 95 S. Ct. at 2261-2262, 45 L.Ed.2d at 427 cited in *State v. Johnson,* 573 A.2d 909 (N.J. 1990). Temporal proximity is not an issue in this case.

The presence of intervening circumstances "can be the most important factor in determining whether [evidence] is tainted." *Johnson, supra* at 573 A.2d 918. "In the fact of egregious police conduct, the state should show some 'demonstrably effective break in the chain of events leading from the illegal arrest to the [evidence], such as actual consultation with counsel or of the accused's presentation before a magistrate for a determination of probable cause.' " *Id.* quoting *Brown, supra,* 422 U.S. at 611. In *Johnson,* the Court goes through a number of cases where police have made an illegal arrest without probable cause and found evidence that incriminated a defendant either for his escape or for a new offense. The results in those cases is that while courts understandably held the escape was an intervening circumstance for which a defendant may be prosecuted, none of them hold that incriminating evidence was admitted to establish the original offense *for which the defendant had been illegally detained. Id.* at 918.

Finally, the Court should consider the flagrancy and purpose of the police misconduct. It is undisputed that the stop was pre-textural in nature; as Judge Hatfield noted, "Patrolman Cox concedes he detained Gilham and Barcus and deliberately stalled until Deputy Sheriff Dusterhoff could arrive with the warrant." Appendix 12. Other than to detain the Defendants for an admittedly

invalid warrant, in gross violation of the sovereignty of the Blackfeet Tribe, absolutely no reason existed *in the mind of officer Cox* to stop these Defendants. The "clearest indication of attenuation" should be required where the "official conduct was flagrantly abusive of Fourth Amendment rights." 4 LaFave, *Search and Seizure*, § 11.4(b), p. 402 (citing Powell, J. concurring opinion in *Brown v. Illinois, supra*).

Professor LaFave notes that in applying the "purpose and flagrancy" test in *Brown v. Illinois*, the U.S. Supreme Court, in the context of a confession derived from an unconstitutional source.

> In applying that factor to the facts at hand, the court noted that the "impropriety of the arrest was obvious," that it was to undertake and "in the hope that something might turn up," and that its matter was such as "to cause surprise, fright and confusion." Thus, it appears that if a particular arrest is undertaken upon evidence that falls short of probable cause more than slightly, and if its purpose is the obtaining of a statement and it is exploited to that end, then the chances are that the confession thereafter will have been "tainted" by the illegal arrest. *Id.*

Here the "impropriety of the arrest" was obvious, especially to the officers who took part, for its sole purpose was that hope that it might turn up something when and if a valid warrant arrived. Indeed, Deputy Dusterhoff of the Glacier County Sheriff's Department conceded that he had gotten instructions from County Attorney (now Supreme Court Justice) Jim Nelson "[n]ot to execute it, to let the federal authorities handle it" acknowledging that the warrant was worthless and he knew it was so. The

deputy admitted that it was his intent to hold the vehicle without letting it go anywhere, to notify the Federal authorities for a Federal warrant and to apply for a tribal warrant. [S. Tr. P. 29, *ll.* 1-9] Professor LaFave further notes that "taint" has been found, for example, when the arrest was made "without any apparent justification" as part of a dragnet operation, or upon a pretext and " . . . by misleading the arrestee as to the purpose of the arrest." *Id.* at p. 396, citing *Commonwealth v. Barett*, 471 Pa. 34, 369 A.2d 1180 (1977). *See also Rodrick v. State*, 288 Ark. 360, 705 S.W.2d 433 (1986) (Stressing the "clear lack of probable cause, tacitly conceded by the officers.")

Here, the stop was a pretext for holding these Defendants until a warrant could be obtained. As LaFave notes, at n. 27, in *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L.Ed.2d 824 (1979) this Court concluded "[t]his case is virtually a replica of the situation in *Brown* in that defendant 'was also admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance.' " In *Taylor v. Alabama*, 457 U.S. 687, 102 S. Ct. 2664, 73 L.Ed.2d 314 (1982) a case deemed "a virtual replica of both *Brown* and *Dunaway*" the Court said that "[T]he police affected an investigatory arrest without probable cause, *based on an uncorroborated informant's tip*, and involuntarily transported petitioner to the station for interrogation in the hope that something would turn up." (emphasis supplied)

Here, Gilham and Barcus were stopped based on an uncorroborated informant's tip, and nothing more, on the hope something would turn up.

Since the seizure of Gilham was illegal *ab initio* due to the officer's lack of authority, then:

> "The ultimate question, therefore, is whether the search pursuant to a warrant was in fact a genuinely independent source of the information intangible evidence at issue here. This would not have been the case if the agent's decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant."

Murray v. United States, 453 U.S. 533, 108 S. Ct. 2529, 101 L.Ed.2d 472, 483-484 (1988).

In this case, the "ultimate question" is answered in the negative. The panel's platitude that "[w]e understand that this exception may mean that police sometimes benefit from illegal stops," Appendix 6, simply eviscerates the absolute requirement of the independent source exception that the challenged evidence originated from untainted activity.

CONCLUSION

The decision of the Ninth Circuit panel is flatly contrary with a decision of the Montana Supreme Court on an important Fourth Amendment issue not yet addressed by this Court. The conflict is irreconcilable. On the tribal jurisdiction issue, the Court of appeals' decision also is contrary to decisions of the federal courts and state courts of last resort on an issue which has not been but should be decided by this Court. Finally, the Court of

Appeals disregarded a plethora of authority on the "Independent Source" exception to the "fruit of the poisonous tree doctrine" in holding that an illegal stop could be cured by a tipster's information received before the stop. Therefore, the Petitioner respectfully urges that the Court grant her Petition and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. COLLEEN M. BARCUS, Defendant-Appellant.	No. 94-30119 D.C. No. CR-93-16-02-PGH AMENDED MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NORMA A. GILHAM, Defendant-Appellant.	No. 94-30129 D.C. No. CR-93-16-01-PGH (Filed May 19, 1995)

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted February 10, 1995
Seattle, Washington

Before: WRIGHT, HALL, and WIGGINS, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Colleen Barcus and Norma Gilham appeal their convictions and sentences for conspiracy to distribute cocaine and possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. We have jurisdiction pursuant to 21 U.S.C. § 1291, and we affirm.

BACKGROUND

On April 17, 1993, Bureau of Indian Affairs Officer Mike Parker received a tip from a confidential informant ("CI"). The CI stated that Norma Gilham was in Tacoma, Washington, with a companion, attempting to buy cocaine. Parker relayed this information to Glacier County Sheriff's Deputy Wayne Dusterhoff. Based on other information they had received, Dusterhoff and Parker had reason to believe that the companion was Colleen Barcus, and that the CI's tip was reliable. On the basis of this information, the Glacier County Sheriff's Office applied for and received a State of Montana search warrant for Gilham's vehicle. The Sheriff's office then organized several law enforcement agencies to be on the lookout for the vehicle on U.S. Highway 2.

The next afternoon Montana Highway Patrolman Tony Cox, whom Dusterhoff had told of the warrant and the investigation, spotted the vehicle on Highway 2, just outside the Blackfeet Indian Reservation. He turned on his flashing colored lights and started after the car approximately one half mile outside of the Reservation. The car pulled over approximately one half mile inside the Reservation. Cox told Appellants that they were being stopped for speeding, and radioed Dusterhoff. Dusterhoff arrived within ten minutes, as did Parker.

Dusterhoff then left to get the state warrant. During this time, Appellants were not handcuffed and no search was performed. The officers did not execute the state warrant, for fear it was not valid on the Reservation. They instead planned to procure a federal or tribal warrant. When Dusterhoff returned with the state warrant, he started reading it to Appellants to apprise them of the real reason they were being detained. Before he could finish, and before a federal or tribal warrant could be obtained. Barcus jumped into Gilham's car and sped off. She drove at speeds of up to 120 miles per hour to avoid arrest, and proceeded to Lake Hurley, where she was seen throwing a white powdery substance into the lake. Numerous plastic bags with traces of cocaine were subsequently discovered. The car was towed to a holding facility, and a federal search warrant was obtained by the FBI. The search of the car pursuant to the federal warrant revealed traces of cocaine throughout the car and in Appellants' purses, $1,600 in the glove compartment, and handwritten notes in both purses that allegedly are evidence of drug transactions.

Appellants were indicted on charges of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1). The district court denied two motions to suppress evidence seized from Gilham's automobile. Appellants were convicted by a jury, in a joint trial, on all counts. Gilham was sentenced to concurrent terms of 63 months on each count. Barcus was sentenced to 78 months. They both appeal their convictions as well as their sentences.

I. Fourth Amendment Challenge

Barcus and Gilham argue that the district court should have suppressed evidence (cocaine and drug paraphernalia) seized from Gilham's car, because the stop of the car violated the Fourth Amendment. We disagree. Even if the initial stop was improper, the challenged evidence is admissible because it fits within the "independent source" exception to the fruit of the poisonous tree doctrine.

a. Initial Stop

The initial stop was supported by probable cause. The CI who provided the initial tip had proven to be reliable several times in the past. As this circuit has noted: "If the informant has provided accurate information on past occasions, he may be presumed trustworthy on subsequent occasions." *United States v. Angulo-Lopez*, 791 F.2d 1394, 1397 (9th Cir. 1986). The Fourth Amendment does not require police to obtain a warrant to search an automobile when, as here, they have probable cause to believe it contains contraband or evidence of a crime. *Arkansas v. Sanders*, 442 U.S. 753, 760 (1979); *United States v. Hatley*, 15 F.3d 856, 858 (9th Cir. 1994). Further, because Montana Highway Patrolman Cox had probable cause to make the stop based on a belief there would be evidence of drug trafficking activity, this was not a pretextual stop, as Appellants argue. *See United States v. Mota*, 982 F.2d 1384, 1386 (9th Cir. 1993).

The stop may have been improper because Patrolman Cox lacked jurisdiction to make the stop on the Blackfeet

Reservation, however. Appellants note that the Blackfeet have not ceded general jurisdiction to the state of Montana, and that Cox's cross-deputization is restricted to enforcement of traffic laws on the Reservation. On the other hand the stop, which was supported by probable cause, was initiated outside the Reservation. The doctrine of hot pursuit therefore may render the stop permissible. We do no need to reach this question, however. We agree with the district court that even if the initial stop was improper, the challenged evidence is admissible. The evidence fits within the "independent source" exception to the fruit of the poisonous tree doctrine.

b. Independent Source Exception

Under the "independent source" doctrine, evidence that is found not as a result of an illegal search or seizure, but by independent means, is admissible. *See Segura v. United States*, 468 U.S. 796, 813-14 (1984) ("Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized."). This exception applies in the present case.

Appellants contend that the federal warrant under which the search was conducted was tainted. That is, the probable cause supporting the issuance of that warrant was supplied by Barcus' actions in response to the allegedly illegal stop. It is true that FBI Special Agent Wilson's affidavit in support of the federal warrant contained information regarding events subsequent to the objectionable stop. This does not necessarily mean that

evidence seized pursuant to the warrant must be suppressed, however.

This circuit has ruled that evidence seized pursuant to a tainted warrant need not be suppressed if, after excising the improper information from the affidavit submitted in support of the warrant, the remaining, untainted evidence still provided probable cause sufficient to issue the warrant. "The mere inclusion of tainted evidence in an affidavit does not, by itself, taint the warrant or the evidence seized pursuant to the warrant. Rather, a reviewing court should excise the tainted evidence and determine whether the remaining untainted evidence would provide a neutral magistrate with probable cause to issue a warrant." *United States v. Reed*, 15 F.3d 928, 933 (9th Cir. 1994) (citations omitted).

As described above, there was sufficient evidence to provide probable cause to search Gilham's vehicle before the initial stop took place. The affidavit submitted in support of the federal warrant included not only evidence resulting from the objectionable stop, but also all of that pre-stop information that had served as the basis for the initial warrant. The federal warrant thus was supported by probable cause wholly apart from any information obtained as a result of the initial stop. Because the excised version of the affidavit was sufficient to establish probable cause for the warrant, we hold that the independent source exception applies in the instant case. The evidence is therefore admissible.[1]

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[1] We understand that this exception may mean that police sometimes benefit from illegal stops. In the instant case, for

II. Admission of the Scraps of Paper

Scraps of paper found in Appellants' purses were admitted as "drug ledgers." Appellants argue that the papers, which contained mathematical equations and lists of names and numbers, should not have been admitted into evidence. Even if we assume that the district court erred by admitting the papers, we hold that the error was harmless in light of the overwhelming evidence against Appellants.

III. Sufficiency of the Evidence

We also reject Appellants' assertion that the evidence was insufficient to support their convictions. In reviewing the sufficiency of the evidence, we must uphold the convictions if, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1189 (9th Cir. 1992). Appellants argue that the essential elements of conspiracy were not proven. The

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example, the stop prevented Appellants from driving on and hiding the evidence. This, however, is not a bar to the exception's application: "It may be that, if the agents had not entered the apartment, petitioners might have arranged for the removal or destruction of the evidence, and that in this sense the agents' actions could be considered the 'but for' cause for discovery of the evidence. . . . The essence of the dissent is that there is some 'constitutional right' to destroy evidence. This defies both logic and common sense." *Segura*, 468 U.S. at 816.

elements of conspiracy are: 1) an agreement to accomplish an illegal objective; and 2) the requisite intent necessary to commit the underlying substantive offense. *United States v. Penagos*, 823 F.2d 346, 348 (9th Cir. 1987), *modified by United States v. Shabani*, 115 S. Ct. 382 (1994). Appellants drove thousands of miles together to get the drugs; cocaine was found in both of their purses; Gilham owns the car and was the subject of the original CI tip, while it was Barcus who jumped in the car and sped off to get rid of the evidence. In sum, there was sufficient evidence to allow a rational trier of fact to conclude that these Appellants were working in concert to accomplish an illegal objective.

IV. Sentencing Guidelines

Appellants also appeal their sentences on various grounds. They first argue that the district court erred in basing their sentences on a finding that they possessed with intent to distribute 500 grams of cocaine. The district court's factual findings in the sentencing phase are reviewed for clear error. *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1174 (9th Cir. 1994). Under the Guidelines, the sentencing judge must approximate the quantity of the controlled substance when the amount seized does not reflect the scale of the offense. U.S.S.G. § 2D1.1 application note 12.

We hold that the district court did not clearly err in estimating the amount of cocaine to be 500 grams. First, on a scrap of paper found in Gilham's purse, the number 500 was divided by 28. Agent Clouse testified that this was the normal means of converting grams into ounces,

which was consistent with the drug trade.[2] Second, the 500 figure from the note was corroborated by other evidence. Agent Wilson testified (and demonstrated) at the sentencing hearing that the empty containers found at the scene easily could have held 500 grams. Lastly, as the district court noted, the reason that the evidence of amount is not more reliable is because Barcus destroyed it. We agree that to allow her to benefit from that act would not "make a whole lot of sense."

Appellants also argue that the district court erred by not subtracting, from the 500 grams, the amount they intended for personal use. The district court cannot include the amount of drugs intended for personal use in its computation of the base offense level for possession with intent to distribute. *United States v. Kipp*, 10 F.3d 1463, 1466 (9th Cir. 1994). However, in this case, the district court did not include personal-use amounts in his 500 gram determination. It is clear that the 500-gram figure he settled upon represented *the amount he believed Appellants intended to sell.* The issue of personal use was before him, having been brought up repeatedly by both Appellants. Yet he agreed completely with the findings of the officers and the probation department: "For the record here, I reaffirm my judgment . . . that this number . . . is an accurate number of what happened here."

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[2] The fact that this paper was not admissible at trial does not mean that it cannot be used for sentencing. To be used in sentencing, it must be reliable, and we find that it is. Agent Clouse's testimony, as well as the other corroborating evidence, indicates that this is a reasonable estimate as to the amount of cocaine.

Gilham also argues that the district court erred in not adjusting her sentence downward for her acceptance of responsibility or for her minor role in the offense. Gilham's statement at the sentencing hearing does at first blush appear to be an acceptance of responsibility. However, U.S.S.G. § 3E1.1 application note 2, states that this adjustment is not meant for those who put the government to the burden of proving their factual guilt at trial, and then demonstrate remorse. Rather, the determination of whether the defendant has accepted responsibility "will be based primarily upon pre-trial statements and conduct." *Id.* Accordingly, the district court's refusal to grant this adjustment was not clearly erroneous. The district court's refusal to adjust Gilham s sentence downward under the minimal participant provision of U.S.S.G. § 3E1.1 also was not clearly erroneous. There is much evidence to support the district court's denial, including the facts that the initial tip was focused upon Gilham, and that her car was used for the trip from Montana to Washington.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court, with regard to both Appellants, in all respects.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. NORMA GILHAM and COLLEEN BARCUS, Defendants.	)	NO. CR-93-016-GF MEMORANDUM AND ORDER

BACKGROUND

On April 17, 1993, the Glacier County Sheriff's office received a tip that Norma Gilham would be traveling to Browning, Montana, with a large amount of illegal drugs, in a vehicle with Montana license plate "38 SPECL". As a result, law enforcement officers from the Glacier County Sheriff's Department, the Bureau of Indian Affairs and the Montana Highway Patrol set up surveillance on U.S. Highway 2. In addition, Deputy Sheriff Wayne Dusterhoff of the Glacier County Sheriff's office and Bureau of Indian Affairs Police Officer Mike Parker obtained a search warrant from the Glacier County Justice of the Peace. The warrant authorized the search of the following vehicle:

> one 1990 Pontiac Grand Am automobile, red in color, Montana License plate 38 SPECL, VIN

1G5WP14VOLF290816 registered to Norma A. Gilham.

On April 18, 1993, patrolman Tony Cox of the Montana Highway Patrol, relying upon the search warrant, stopped Gilham's vehicle approximately one-half mile inside the Blackfeet Indian Reservation, and questioned the occupants, Norma Gilham and Colleen Barcus. Patrolman Cox concedes he detained Gilham and Barcus and deliberately stalled until Deputy Sheriff Dusterhoff could arrive with the warrant. Once Deputy Dusterhoff arrived, he began reading the search warrant to Gilham and Barcus. Before he could finish, however, Barcus jumped in the car and fled, with the various law enforcement officers in pursuit. Barcus was ultimately apprehended after a high speed chase.

The unrefuted testimony elicited at the evidentiary hearing established that the Bureau of Indian Affairs officers apprehended Barcus as she was dumping what appeared to be cocaine into a lake. In addition, the officers testified they observed cocaine in plan view in the defendants' vehicle. The vehicle was eventually searched pursuant to a valid federal warrant, and a quantity of cocaine was recovered.

DISCUSSION

Defendants, Norma Gilham and Colleen Barcus, have moved the court, pursuant to Fed.R.Crim.P. 12(b)(3), to suppress all evidence derived as a result of a search of their vehicle. Defendants concede the disputed evidence

was seized pursuant to a valid federal warrant. Nevertheless, the defendants assert the evidence must be suppressed because the search was tainted by the fact the defendants were originally detained on the basis of an invalid warrant issued by Glacier County Justice Court. Defendants maintain the warrant was invalid because the Glacier County Justice of the Peace lacked the requisite authority to issue a valid search warrant with respect to Indian persons on an Indian Reservation.

The court heard oral argument on defendants' motion on September 9, 1993. Having reviewed the record herein, together with arguments and testimony elicited during the September 9, 1993, hearing, the court is compelled to DENY defendants' motion.

The exclusory rule is a judicially-designed remedy whose primary purpose is to discourage unconstitutional (or possibly otherwise illegal) police misconduct. *U.S. v. Sheppard*, 901 F.2d 1230, 1234 (5th Cir. 1990) (citations omitted). It functions to suppress not only evidence obtained as a direct result of an illegal search or seizure, but also subsequently discovered found to be derivative of an illegal search or seizure, *i.e.*, "fruit of the poisonous tree." *See, Segura v. United States*, 468 U.S. 786, 804 (1983).

In certain situations, however, the causal connection between an illegal search or seizure and the acquisition of evidence is so remote or attenuated as to purge the taint of the constitutional violation and to render the evidence admissible. *See, Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939). Consequently, evidence is not to be excluded if the connection between the illegal police

conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint of the prior illegality." *Segura, supra,* 468 U.S. at 805, *quoting, Nardone v. United States,* 308 U.S. 338, 341 (1939). For example, the exclusionary rule has no application "where the Government learned of the evidence from an independent source." *Id.*

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others.

Segura, supra, 468 U.S. at 805, *quoting, Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392 (1920).

In the case *sub judice,* assuming the initial detention of the defendants was illegal, the court concludes the intervening flight of defendant Barcus and the subsequent chase, together with the other untainted evidence known to the law enforcement officers, clearly supplied probable cause to arrest defendant Barcus and search the subject vehicle. Furthermore, it is undisputed that the law enforcement agents observed the challenged evidence in plain view in defendants' vehicle at the time Barcus was apprehended, thereby falling within the "plain view" exception to the warrant requirement. Under the facts presented, the court concludes the Government learned of the challenged evidence from an independent source sufficiently removed from the initial detention so as to

purge the taint of any constitutional improprieties inherent in the detention and initial warrant issued by the Glacier County Justice Court.

Accordingly, the court hereby DENIES defendants' motion to suppress.

IT IS SO ORDERED

DATED this 1st day of October, 1993.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

AMENDMENT IV (1791)

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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25 U.S.C. § 1324. **Special election**

State jurisdiction acquired pursuant to this title [25 USCS §§ 1321 et seq.] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

(Apr. 11, 1968, P.L. 90-784, Title IV, § 406, 82 Stat. 80.)

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(2)

Nos. 95-285 and 95-5697

Supreme Court, U.S.
FILED
SEP 21 1995
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NORMA A. GILHAM AND COLLEEN A. BARCUS,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF OF AMICUS CURIAE BLACKFEET TRIBE

IN SUPPORT OF WRITS OF CERTIORARI

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September, 1995

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INTEREST OF AMICUS

The Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, is a federally recognized Indian tribe occupying a reservation of over 500,000 acres in north central Montana. The Tribe is organized as a constitutional government under section 16 of the 1934 Indian Reorganization Act, 25 U.S.C. § 476.

The Blackfeet Tribe has an interest in these cases because serious jurisdictional issues are raised concerning the authority of state officials to stop Blackfeet tribal members on the Blackfeet Reservation and to execute a state search warrant against property of tribal members. Assertion of such authority by state officials impacts the sovereignty and self-determination of the Blackfeet Tribe and the Tribe's ability to govern its own members within the Reservation boundaries.

STATEMENT OF THE CASE

On April 18, 1993, Norma Gilham and Colleen Barcus were the sole occupants of an automobile which was stopped by Montana Highway Patrolman Tony Cox. The stop took place within the exterior boundaries of the Blackfeet Indian Reservation. Both Gilham and Barcus are enrolled members of the Blackfeet Tribe. The stop by the State law enforcement officer was made pursuant to a search warrant issued by the Justice of the Peace, Glacier County, Montana. The automobile was stopped for speeding, an admitted pretext, while the Glacier County search warrant could be located and served upon Gilham and Barcus.

Cox detained Gilham and Barcus at the point of stop until Glacier County Deputy Sheriff Wayne Dusterhoff arrived with the search warrant issued by the Justice of the Peace. When Dusterhoff arrived and while he was reading the search warrant, Barcus fled the scene. Various law enforcement officers pursued Barcus and she

was ultimately apprehended and arrested while still on the Reservation. The automobile was seized and a federal warrant was subsequently obtained to search the automobile. Evidence from the stop and from the search was used in the federal criminal proceedings against Gilham and Barcus. Both Gilham and Barcus were eventually convicted on charges of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Both are currently in federal custody.

SUMMARY OF ARGUMENT

The search warrant under which Petitioners Gilham and Barcus, Blackfeet tribal members, were stopped on the Blackfeet Reservation could not be executed by state law enforcement officials against tribal members on the Reservation. It is well-established that states lack criminal jurisdiction over Indian offenders on a reservation or within Indian country. Solem v. Bartlett, 465 U.S.

463, (1984); U.S. v. John, 437 U.S. 634 (1978). Because states lack criminal jurisdiction, state law enforcement officials also lack jurisdiction to execute state court warrants against Indian offenders on a reservation. United States v. Baker, 894 F.2d 1144, 1146 (10th Cir. 1990); U.S. v. Anderson, 857 F.Supp. 52, 54 (D.S.D. 1994).

While states may assume criminal jurisdiction on Indian reservations under P.L. 83-280, 18 U.S.C. § 1162 and 18 U.S.C. § 1350, the State of Montana has never assumed such jurisdiction over the Blackfeet Reservation. Neither has the Blackfeet Tribe otherwise authorized state law enforcement officials to execute state court search warrants on the Reservation.

This Court has not specifically held that state law enforcement officials lack jurisdiction to execute state court warrants against Indian offenders within an Indian reservation, although lower courts have so held. Such a conclusion flows from the States' lack of criminal

jurisdiction over such offenders. The Court should clarify this issue which has significant importance in the development of appropriate law enforcement on Indian reservations, and to a tribe's continuing authority to govern its members.

ARGUMENT

The Court Should Review These Cases to Confirm That Execution of a State Court Search Warrant Against Indians or Indian Property Within an Indian Reservation is Prohibited Without Congressional Consent

A. The State Lacks Jurisdiction to Issue, and State Law Enforcement Officers Lack Jurisdiction to Execute, a Search Warrant Against Blackfeet Tribal Members on the Blackfeet Reservation

Indian tribes are "distinct, independent political communities, retaining their original natural rights in matters of local self-government." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978). Their rights of self-governance, however, can be limited, modified or even eliminated by Congress, id. at 56, but only if Congress explicitly authorizes such a divestiture. Absent an explicit congressional authorization, Indian tribes retain their

rights of self-governance and states lack jurisdiction over Indians or Indian property on the reservation. See Bryan v. Itasca County, 426 U.S. 373, 376-77 (1976); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 170-71 (1973); Williams v. Lee, 358 U.S. 217, 220 (1959).

In the particular area of criminal jurisdiction, tribal courts and/or federal courts have exclusive jurisdiction over offenses committed by tribal members on their reservation. See 18 U.S.C. § 1152 (Indian Country Crimes Act), and 18, U.S.C. § 1153 (a) (the Major Crimes Act). See also Negonsett v. Samuels, ___ U.S. ___, 113 S.Ct. 1119, 1121-22 (1993); United States v. Wheeler, 435 U.S. 313 (1978). Thus, the states are prohibited from exercising jurisdiction over crimes committed by Indians within Indian reservations. Solem v. Bartlett, 465 U.S. 463, (1984); U.S. v. John, 437 U.S. 634 (1978).

Because state courts lack criminal jurisdiction over Indian offenders on Indian reservations, state courts also

lack jurisdiction to issue search warrants against Indians or Indian property on reservations. United States v. Baker, 894 F.2d 1144, 1146 (10th Cir. 1990) (County District Court acted beyond its authority in issuing a search warrant for evidence on reservation property of an Indian). And, state law enforcement officials lack jurisdiction to execute state court warrants within Indian reservations. U.S. v. Anderson, 857 F.Supp. 52, 54 (D.S.D. 1994) (parole agents lack criminal jurisdiction to conduct a warrantless search of Indian's residence within Indian country).

In 1953, Congress provided for the extension of state jurisdiction over criminal matters on Indian reservations through P.L. 83-280, codified at 18 U.S.C. § 1162 and 18 U.S.C. § 1350. However, the State of Montana did not choose to assume criminal (or civil) jurisdiction over the Blackfeet Indian Reservation at that time or in any subsequent years.

Congress added an additional requirement to state

assumption of jurisdiction when it enacted the 1968 Indian Civil Rights Act, 25 U.S.C. § 1301, et seq. Section 1321 of the Act provides for an assumption of criminal jurisdiction by states "with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption...." The Blackfeet Tribe has never consented to an assumption of criminal jurisdiction by the State of Montana in a special election called for that purpose as required by 25 U.S.C. § 1321.

Section 1321 makes clear that Public Law 280 as amended by the Indian Civil Rights Act is the sole mechanism by which the State of Montana could assume jurisdiction over criminal offenses committed by or against Indians in Indian country, including the offenses alleged to have been committed by Gilham and Barcus.[1]

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[1] The law is equally clear that absent tribal consent, a state has no jurisdiction over highways running through Indian lands in the state. Rosebud Sioux Tribe v. State of South Dakota, 900 F2d. 1164 (8th Cir. 1990); cert denied 500 U.S. 915 (1991).

See Kennerly v. District Court, 400 U.S. 423 (1971). Since Montana has not assumed criminal jurisdiction under the procedure provided for by Congress, State Patrolman Cox and Glacier County Deputy Sheriff Dusterhoff indisputedly lacked jurisdiction to stop Gilham and Barcus as members of the Blackfeet Tribe on the Blackfeet Reservation.

B. The Provisions of Blackfeet Law Authorizing Cross-Deputization Does Not Provide Jurisdiction to Execute the Search Warrant Against Tribal Members on the Reservation

The Blackfeet Tribe and the State of Montana have a long-standing mutual recognition of criminal activities and law enforcement problems on the Blackfeet Indian Reservation. The parties as respective sovereigns have attempted to address the issues through cross-deputization agreements.

In 1959, the Blackfeet Tribal Business Council, the governing body of the Blackfeet Tribe, enacted Blackfeet

Tribal Ordinance No. 9-59, providing for, among other things, the issuance of deputy commissions to the Montana Highway Patrol as tribal police. Cross-deputized officers have "the same powers to apprehend and arrest persons subject to the jurisdiction of the Blackfeet Tribe as the tribal police." See Blackfeet Tribal Ordinance No. 9-59, attached hereto as Appendix A. In the Ordinance, the Tribal Council also adopted the traffic and highway laws of the State of Montana as tribal law.[2]

This Ordinance provides for the Blackfeet Tribe to commission an officer of the Montana Highway Patrol as a special deputy to enforce the laws of the Blackfeet Tribe on the Blackfeet Indian Reservation. Tribal members and other Indians who commit criminal offenses

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[2] The Blackfeet Tribal Business Council had authority to enact Ordinance 9-59 under the provisions of the Blackfeet Constitution. Article VI, Section 1 (k) authorizes the Council to "promulgate ordinances for the purposes of safeguarding the peace and safety of residents of the Blackfeet Indian Reservation..." Article VI, Section 1 (a) also authorizes the Council to "negotiate with Federal, State and local Governments on behalf of the tribe..."

are brought before the Blackfeet Tribal Court for prosecution. Ordinance 9-59 at paragraph 1.d.

The Montana Highway Patrol approved and agreed to the substantive terms and conditions contained in Ordinance No. 9-59, see approval noted on Ordinance 9-59. This arrangement governed the enforcement of Tribal traffic and highway laws by the Montana Highway Patrol until recently.

The cross-deputization arrangement under Ordinance 9-59 is not a grant of jurisdiction to the State of Montana. Instead, it merely provides a mechanism by which a duly commissioned state law enforcement officer can assist in the enforcement of the laws of the Blackfeet Tribe on the Blackfeet Reservation. The Ordinance cannot and does not validate what is an otherwise extra-jurisdictional state court warrant, nor does it authorize execution of state warrants.

Earlier this year, the Blackfeet Tribal Business Council and the State of Montana entered into a new

agreement. The new agreement was negotiated after the State of Montana raised questions concerning the validity of the 1959 cross deputization arrangement in light of the intervening Montana State-Tribal Cooperative Agreements Act of 1981, MCA § 18-11-101, et seq. This Act provides that in any agreement between the State of Montana and an Indian tribe regarding law enforcement, the agreement must include the following:

(a) the minimum training standards and qualifications of law enforcement personnel;

(b) the respective liability of each public agency and tribal government for the actions of law enforcement officers when acting under the provisions of an agreement;

(c) the minimum insurance required of both the public agency and the tribal government; and

(d) the exact chain of command to be followed by law enforcement officers acting under the provisions of an agreement.

Section 18-11-111 of the Cooperative Agreement Act further states that the Act does not affect the validity of any agreement between a tribe and a state agency which was entered into prior to July 1, 1981. However,

any such agreement must satisfy the requirements of the Act no later than July 1, 1983.

None of the four conditions of the Montana Cooperative Agreement Act was contained in the 1959 Ordinance, nor was the Ordinance subsequently amended to comply with the Act. The State of Montana treated the cross-deputization arrangement as implicitly invalid because of the non-conforming nature of the arrangement, and the Montana Highway Patrol was directed "to refrain from issuing tickets to tribal members on the Reservation until the Agreement was reached." See Letter dated February 14, 1995, from Sarah A. Bond, Assistant Attorney General, State of Montana, to Donald G. Kittson, Blackfeet Legal Department, copy of which is attached hereto as Appendix B.

Since the cross-deputization arrangement did not and does not comply with the 1981 Act, any cross-deputization of Patrolman Cox cannot be used as a basis for jurisdiction to stop Gilham and Barcus. Therefore to

the extent that cross deputization of Patrolman Cox is relied on as the basis for executing the state court warrant, it must fail as a matter of state law.

C. Clarification of Authority to Execute State Court Search Warrants Within Indian Reservations is Important to Maintain Law Enforcement on Indian Reservations and is Essential to Tribal Self-Government

Law enforcement on the Blackfeet Reservation, like other Indian reservations, is complicated because criminal jurisdiction on the Reservation "is governed by a complex patchwork of federal, state, and tribal law." Negonsott v. Samuels, ___ U.S. ___, 113 S.Ct. 1119, 1121 (1993). It is therefore of major importance that law state, federal and tribal law enforcement officials understand their authority and their limits. Otherwise, offenders who should be convicted may go free, and offenders who should be prosecuted may go unprosecuted.

Equally important is the right of tribal governments, as sovereign entities, to govern their own members within the territorial boundaries of their Reservation. Execution of state court search warrants against tribal members on

the reservation clearly undermines tribal self-government. Cf. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1984); Williams v. Lee, 358 U.S. 217 (1959).

Recognition of tribal sovereignty in the context of this case would have required the state law enforcement officials to take the simple step of obtaining the concurrence or endorsement of the Blackfeet Tribal Court on the state court warrant. This Court should clarify the need to take this simple step which would, at the same time, recognize the sovereign authority of the Tribe and contribute to law enforcement on the Reservation.

CONCLUSION

For the reasons stated above, this Court should grant the petitions for certiorari to confirm that state court search warrants cannot be executed against Indians or

Indian property involving tribal members on their own reservation.[3]

Respectfully submitted,

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Blackfeet Tribe of the
Blackfeet Indian Reservation

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[3] The Petitioners address the issue of whether there is any basis, other than the jurisdictionally invalid state court search warrant for admission of the evidence obtained. The Tribe would note that a jurisdictionally invalid search warrant, unlike a search warrant that is merely technically deficient, may preclude any evidence obtained as a result of the void search warrant. Compare United States v. Baker, 894 F.2d 1144, 1148 (10th Cir. 1990).

APPROVED August 18, 1959
Montana Highway Patrol Board
By /s/ Martin J. Murphy
Secretary

August 6, 1959

ORDINANCE No. 9-59

By virtue of authority contained in Article VI, section 1(k) of the Constitution for the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana, the Law and Order Code of the Blackfeet Indian Tribe is hereby amended as follows:

1. The rules and regulations governing the operation of motor vehicles on highways within the Blackfeet Tribe shall be measured by and identical to the laws of the State of Montana -- specifically, the Revised Codes of Montana for 1947, Title 32, Chapter 11 relating to Speed and Traffic Regulations, Title 32, Chapter 12 being the Uniform Accident Reporting Act, and Title 32, Chapter 21 being the Uniform Act Regulating Traffic on Highways -- as amended and in force on June 26, 1959, subject to the following necessary qualifications:

a. The words "local authorities" or similar terms used in said State Code shall be deemed to

include the Blackfeet Tribal Council;

b. The words "peace officer", "local police department" or "officer of the Montana highway patrol", or similar terms used in said State Code shall be deemed to include members of the Blackfeet tribal police force, Indian Bureau policemen or other law enforcement officers employed by the Federal or tribal government;

c. The words "county or municipal jail" or similar terms used in said State Code shall be deemed to mean the Blackfeet tribal jail; and

d. All offenses punishable under said State Code shall be triable in the Blackfeet Tribal court, and all fines collected shall be paid to the Blackfeet Tribe for use exclusively in the maintenance of law and order on the Blackfeet Reservation.

2. No person subject to the jurisdiction of the Blackfeet Tribe may operate a motor vehicle on highways within the Blackfeet Reservation unless he or she possesses a driver's license and license plates valid for use outside the Reservation, as set forth in the Revised Codes of Montana, Title 31, Chapter 1 relating to the Highway Patrol and Title 53, Chapter 1 relating to the Registration of Motor Vehicles. Any violation of this provision shall be punishable in tribal court on the same terms and conditions as a like offense would be punishable in State court.

3. The Blackfeet Tribal Council, in the interest of promoting traffic safety, may issue deputy commissions as tribal police to members of the Montana Highway Patrol, and any officers holding such deputy commissions shall have the same powers to apprehend and arrest persons subject to the jurisdiction of the Blackfeet Tribe as the tribal police.

4. The Blackfeet tribal court, through the Secretary of the Blackfeet Tribal Council, shall send monthly reports to the Montana Highway Patrol concerning traffic cases on forms to be provided by the Highway Patrol.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION

By: /s/ Walter S. Wetzel, Chairman
Walter S. Wetzel, Chairman
Blackfeet Tribal Business Council

ATTEST:

/s/ Iliff McKay
Iliff McKay, Secretary
Blackfeet Tribal Business Council

CERTIFICATION

I hereby certify that the above foregoing ordinance was adopted by the Blackfeet Tribal Council in Regular Session duly called, noticed, convened for business the 6th day of August, 1959 with seven (7) members present to constitute a quorum.

By: /s/ Iliff McKay
Iliff McKay, Secretary
Blackfeet Tribal Business Council

ATTORNEY GENERAL
STATE OF MONTANA

Joseph P. Mazurek
Attorney General

Department of Justice
215 North Sanders
PO Box 201401
Helena, MT 59620-1401

February 14, 1995

Mr. Donald G. Kittson
Blackfeet Legal Department
P.O. Box 849
Browning, MT 59417

Dear Don:

Thank you for hosting our meeting of last week. We appreciated the warm welcome and open discussion with the Council about updating our 1959 agreement respecting State Highway Patrol issuance of traffic citations to the tribal members on the Reservation. As the Attorney General noted at that meeting, the current negotiations toward redrafting that agreement are to bring it into compliance with the 1981 State-Tribal Cooperative Agreements Act, Mont. Code Ann. § § 18-11-101 to -112 (1993). The Cooperative Agreements Act requires state-tribal agreements to address specific issues, e.g., training standards, liability and minimum insurance requirements, Mont. Code Ann. § 18-11-104 (a), (b) and (c) (1993), which were not addressed in the prior agreement.

The question whether the 1959 agreement is still "valid" is unclear. In my experience in public contracting, I have found that the questions of an agreement's validity and any proposed remedies for a supposedly invalid agreement with the state are intertwined, so that the answer to the question of validity may well depend on who is raising the issue, (a party or nonparty?) who relied on the agreement, how a dispute arose and what remedy,

if any, is requested. See e.g., Taurman, v. Town of Cascade, 192 Mont. 529, 629 P.2d 226 (1981); Montana Ass'n of Underwriters v. Department of Administration, 172 Mont. 211, 563 P.2d 577 (1977).

You indicated a recipient of a state-issued traffic citation is challenging the prosecution on the claim that the ticket was invalid because the 1959 agreement is "invalid." The Tribe has chosen to prosecute, however, and whether it has sufficient evidence to convict, I can't say. Further, whether the Tribe chooses to recognize this challenge is a matter of tribal law on which we would not opine.

You inquired about an Attorney General's Opinion. The Attorney General's authority to issue opinions is subject to statute and policy. Enclosed for your information are the current guidelines and citations to relevant statutes.

I hope we can keep the momentum going and execute the new agreement soon. Due to our liability concerns about potential actions against state law enforcement officers, and the nonconforming nature of the 1959 agreement, the Highway Patrol will continue to refrain from issuing tickets to tribal members on the Reservation until the new agreement can be executed.

I look forward to meeting with you the afternoon of February 27, 1995. I am hopeful we can get the highway patrol agreement ready for presentation on March 2, 1995.

Thank you for all your cooperation.

Very truly yours,

/s/ Sarah A. Bond
SARAH A. BOND
Assistant Attorney General

sab/brf
Enc.

cc: Col. Craig Reap
Sgt. Alan Michaels